IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

UNITED STATES OF AMERICA	)	
v.	)	**Criminal No. 5:14-cr-00244**
DONALD L. BLANKENSHIP	)	

REPLY IN SUPPORT OF
DEFENSE MOTION FOR PRELIMINARY DETERMINATION
OF THE ADMISSIBILITY OF PURPORTED
CO-CONSPIRATOR STATEMENTS AND ACTS

In its opening motion, the defense made a modest request of the Court – to undertake some form of preliminary process under Rule 104 to ascertain if a foundation existed for the admission of evidence of any co-conspirator acts or statements. The defense did not state that an actual hearing was "required," as the government alleges. To the contrary, it made clear that a hearing was one option and that another option might be to require a written proffer from the government. *See* ECF No. 310 at 4. At bottom, the defense simply seeks *some form* of preliminary determination, whether by hearing or not, to ensure that inadmissible evidence is not presented against Mr. Blankenship at trial.

Rather than agreeing to such a process, the government asks that the Court admit *all* co-conspirator acts and statements on the understanding that the government will lay the necessary foundation at some later point in trial. *See* ECF No. 330 at 27-28. This will not suffice here. The universe of potential co-conspirator evidence is too large, and its contours are too unknown. It will lead to disarray, mistake, and mistrial.

This is not like the cases typically reviewed by the Fourth Circuit, where alleged co-conspirators are actual co-defendants, where unindicted co-conspirators are named in the indictment or in a bill of particulars, or where the universe of alleged co-conspirators otherwise is discrete. Rather, this is a case where the universe of potential co-conspirators encompasses hundreds of persons and where the government has not identified a single one. It is case where the conspiracy spans 27 months and potentially includes, according to the indictment, hundreds upon hundreds of acts.

On this record, it makes no sense to permit the government to admit whatever acts and statements it wishes subject to tying it up later in the trial. At the close of the government's case, the Court will be left with the daunting task of sifting through each admitted co-conspirator act or statement and then determining whether there is evidence to show that the officials or miner responsible for each one (of the hundreds the government may present) was a member of the alleged conspiracy and that each act or statement was in furtherance of the alleged conspiracy. And if the Court determines, at this late stage, that the government presented significant amounts of evidence for which there was no evidentiary foundation, it will be required to declare a mistrial.

Given the universe of potential evidence and the great uncertainty about who is and is not an alleged co-conspirator, this process should occur before the trial, not during it, and before evidence that is inadmissible against Mr. Blankenship is presented to the jury.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed and service has been made by virtue of such electronic filing this 1st day of September, 2015 on:

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